

"Sec. 1. Definitions. Words and phrases as used in this act (G. C., Sections 1390 to 1454) shall be construed as follows:

* * * * *

Person: Includes company, partnership, corporation or association, also any employe, agent or officer thereof."

* * * * *

Sell and sale: Barter, exchange, giving away and offering or exposing for sale. * * *

By the plain and unambiguous language of Section 1414-1, supra, minnow dealers "shall not * * * sell to any one person more than one hundred minnows in any one day." As provided by Section 1390, supra, the word "person" shall be construed to include any company, partnership, corporation or association, also any employe, agent or officer thereof.

In view of the language used in the sections of the General Code herein referred to I am of the opinion that a minnow dealer may not legally sell to any one person more than one hundred minnows in any one day. The fact that the vendee also is a minnow dealer would not constitute a defense to a prosecution of the vendor instituted under Section 1454, supra, charging such vendor with selling more than one hundred minnows to any one person in any one day.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1976.

FIREMEN'S PENSION FUND—SELECTION OF TRUSTEES—AUTHORITY UNDER CHARTER—MANDATORY DUTY OF MUNICIPALITY.

SYLLABUS:

1. *The council of a city, if vested with full legislative power by charter and not otherwise restricted by charter, may provide by ordinance a method of selecting a board of trustees of a firemen's pension fund at variance with that prescribed by general law.*

2. *It is not the mandatory duty of a municipality to levy a tax under authority of Section 4605 of the General Code for the maintenance of a firemen's pension fund theretofore established in such municipality.*

3. *Failure of a member of a fire department to make voluntary contributions to the firemen's pension fund, in accordance with the rules and regulations of the trustees thereof, does not in any way affect his right to participate in such fund in so far as it is derived from sources other than voluntary contributions.*

COLUMBUS, OHIO, April 16, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent communication in which you make several inquiries relative to municipal firemen's pension funds. You first quote Section 2 of the Charter of the City of Cleveland, which reads as follows:

"The enumeration of particular powers by this charter shall not be held or deemed to be exclusive but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have, and may exercise all other powers which, under the constitution and laws of Ohio, it would be competent for this charter specifically to enumerate."

You then inquire:

"1. May the council of the city of Cleveland provide by ordinance a method of selecting the board of trustees of the firemen's pension fund, at variance with that prescribed by general law?"

I have not all of the provisions of the charter of the city of Cleveland before me. I believe it to be true, however, and am therefore assuming, that the charter gives all of the legislative power of the city to the council and, if so, the council may accordingly exercise all of the legislative powers of the city which it possesses by virtue of the Home Rule Amendments of the Ohio Constitution. I am further assuming that the charter does not make specific provision with relation to the firemen's pension fund. In the absence of such provision, I believe that it is within the power of council to provide by ordinance a method of selecting the board of trustees of such fund at variance with that prescribed by general law. The assumptions which I have made render applicable the language appearing in an opinion of this department, No. 844, dated August 9, 1927, the syllabus of which is as follows:

"Where, by charter provision, all powers of local self-government are reserved to a municipality, and the legislative powers incident thereto are vested in the council of such municipality, such council is authorized to adopt by ordinance a method of selecting the board of trustees of the firemen's pension fund at variance with that prescribed by general law."

You are accordingly advised that the council of the city of Cleveland, if vested with full legislative power by charter and not otherwise restricted by charter, may provide by ordinance a method of selecting a board of trustees of the firemen's pension fund at variance with that prescribed by general law.

Before entering into a discussion of your succeeding questions, it is advisable to refer to and quote in part the sections of the General Code relative to the establishment and administration of firemen's pension funds. You do not advise me whether your succeeding inquiries are made with reference to the city of Cleveland alone or are of general application. I will, therefore, consider the questions generally, indicating wherever charter provisions might be pertinent.

Section 4600 of the General Code provides for the creation of the board of trustees of the fund, and the four next succeeding sections provide for the election of the members of such board, the term of its members and the details of organization. Sections 4605 to 4609, inclusive, are as follows:

Sec. 4605: "In each municipality availing itself of these provisions, to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property, as listed for taxation in such municipality. In the matter of such levy, the board of trustees of the firemen's pension fund shall be subject to the provisions of law

controlling the heads of departments in the municipality, and shall discharge all the duties required of such heads of departments."

Sec. 4606. "A failure of such board of trustees to act in the manner required by law of the heads of departments in such municipality in the making of such levy shall not limit the power of council to make it. If the council fails in any year to make the maximum levy herein authorized, in addition to the amount realized therefrom, there shall be passed to the credit of the fireman's pension fund such portion of the annual tax on the business of trafficking in intoxicating liquors required by law to be passed to the credit of the general fund in the municipality, as when added to the amount realized from such levy for the fireman's pension fund, will equal the amount that would be realized from a full levy of three-tenths of a mill, or such part thereof as is necessary to meet the pension pay roll, but the portion used of such tax on the business of trafficking in intoxicating liquors shall not exceed sixteen-thirtieths of the amount of such tax required to be passed to the credit of the general fund in the municipality."

Sec. 4607: "All fines imposed upon members of the fire department of the municipality by discipline or punishment by the authority having charge or control thereof, and the proceeds of all suits for penalties for the violation of a statute of the state or ordinances of such municipality with the execution of which such department is charged, and licenses or other fees payable thereunder, shall be credited to the pension fund."

Sec. 4608: "The trustees of the fund may take by gift, grant, devise or bequest, moneys, or real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by such trustees."

Sec. 4609: "The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the fire department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries."

Your second inquiry is as follows:

"2. Section 4600, G. C.: A mere fact that council complied with this section establishing a pension fund has the same budget established an irrevocable precedent thereby granting a prescriptive right to make appropriations perpetual regardless of provisions for revenue?"

In substance you ask whether or not a municipality, having once established a pension fund and made appropriation therefor, must thereafter make such appropriation as may be necessary for the proper maintenance of the fund. An answer to this question is dependent upon the proper interpretation of the sections just quoted. As I view the law, it is immaterial whether the fund has been in existence long enough so that the pensionable status of certain former employes has been fixed or not. The right to the continuance of a pension is not in any sense a vested right and it is wholly within the power of the proper legislative authority to abolish or change the status of pension funds. This statement must, however, be qualified to the extent of making it only applicable to so much of the fund as is derived from taxation. The sources of this fund are as follows:

1. A general tax levy of not to exceed three-tenths of a mill (G. C. 4605).

2. Mandatory transfer of a certain proportion of the tax on the business of trafficking in intoxicating liquors in the event of the failure of council to make the maximum levy prescribed by Section 4605 (G. C. 4606).
3. Certain fines and penalties (G. C. 4607).
4. Donations of various character. (G. C. 4608).
5. Voluntary contributions from members of the fire department under the rules (G. C. 4609).

You will observe, however, that Section 4609 of the Code requires the voluntary contributions to be used as a fund to increase the pension that may be granted to such person or his beneficiaries. In my opinion this money constitutes a separate fund apart from that derived from taxation and other sources and is, therefore, entitled to separate treatment.

So far as the fund derived from taxation or sources other than voluntary contributions is concerned, there is no vested or fixed right therein on the part of either a present employe of a fire department or one who is now upon the pension list. The rule is well stated in *McQuillin on Municipal Corporations*, in paragraph 511, as follows:

“The pension allowed to municipal officers does not arise from contract or vested right, but is a matter of bounty to be given or withheld at the pleasure of the sovereign power. Hence, a member of the police force has no vested right in a police pension fund created by act of the Legislature and the Legislature has power to repeal the same. And the fact that policemen contribute a certain amount per month from their salaries toward a pension fund, does not give them contractual rights to a pension under the statutes, which precludes revocation or destruction by subsequent legislation.”

Dillon on Municipal Corporations, Fifth Edition, paragraph 431, is as follows:

“The fund from which municipal pensions are paid is usually created by setting aside certain sources of public income, and frequently provision is made that a stated sum per month shall be retained or deducted from compensation of each of the officers in the department who may become entitled to a pension. Although the sum so deducted from the officer's compensation is called a part of the officer's compensation in the statute, yet the officer never receives it or controls it, and he cannot prevent its appropriation to the fund in question. He has no power of disposition over it such as always accompanies ownership of property. A statute providing for such a deduction in legal effect says that the officer shall receive as compensation each month the net amount payable to him, and that in addition thereto the State or municipality will create a fund by appropriating the amount retained each month for that purpose from which, upon his resignation for bad health or bodily infirmity or dismissal after long and meritorious service, a certain sum shall be paid to him, or at his death to his widow and children where the statute so provides. Being a fund raised in that way, it is entirely at the disposal of the government until, by the happening of one of the events stated,—the resignation, retirement, or death of the officer,—the right to the specific sum becomes vested in the officer or his representative.

In making a change in the disposition of a fund of that character previous to the happening of one of the events mentioned, the State impairs no absolute right of property in the officer. The direction of the State that the fund

should be one for the benefit of the officer or his representative under certain conditions is subject to change or revocation at any time at the will of the Legislature. There is no contract on the part of the State that its disposition shall always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, is to be paid, there is no vested right in the officer to such payment. His interest in the fund is, until then, a mere expectancy created by the law and liable to be revoked or destroyed by the same authority. But when the particular event has happened upon which the money or a part of it is to be paid, the beneficiary of the pension under the pension system acquires, it has been held, a vested right and it is not competent for the Legislature or any other authority to deprive him of that vested right. But the existence of a vested right is dependent upon statutory provisions conferring the pension without qualification and without any reserved right to terminate it. If the statute reserves the power to the local authorities to discontinue the pension in their discretion, the beneficiary does not acquire a vested right in it."

You will observe that the language just quoted indicates a vested right upon the happening of the contingency entitling an individual to participate in the fund. While this position is sound, it does not follow that it charges the public authority with an obligation to make further contributions to the fund. In other words, in so far as moneys are available for the payment of pensions, which have been placed in the fund for the specific purpose, such moneys cannot be lawfully diverted to other purposes. This does not imply that the fund may not become exhausted by failure of appropriation or otherwise.

A case clearly indicating the proper rule is that of *Price vs. Farley, et al.*, 22 O. C. C. 48, in which the relator, a pensioner of the fire department of the city of Cleveland, who had been drawing a pension for several years at the rate of fifty dollars per month, was reduced by subsequent act of the Legislature to the rate of \$42.50 per month. Respecting the validity of this action on the part of the Legislature, the court say :

"While the granting of pensions to the class to which the relator belongs, is highly meritorious and to be commended, it is, nevertheless, of such a nature as to leave it within the power of the Legislature to wholly abolish or change, and no one, whatever may be the merits of his claim, is entitled to any other or different pension than provided by the existing statute.

The repeal in 1890, of all the acts upon this subject, left no foundation upon which the relator can rest a claim for a pension at all except under the provision of the present act passed at the time of said repeal. It is only because of that act that he is entitled to receive any pension whatever.

He is receiving now a pension in accordance with the provision of the present act, which is all, under the statute, he is entitled to receive."

From the foregoing authorities, the rule is deducible that proper legislative authority, by failure to make appropriation for the continuance of a pension fund or by a change in existing law, may affect the rights of participants in the fund. Such legislative authority does not, however, extend to the diversion of funds resulting from a specific levy for the purpose of firemen's pensions and already in such a fund to purposes foreign thereto.

The foregoing general discussion might perhaps not be applicable in the event that there were mandatory provisions requiring the levy of a tax for the support of the fund. If such were the fact, the requirement of the law would be an indication of

the legislative intent of the State that the fund should be maintained, and it accordingly would be mandatory upon the municipality to make levy therefor until the statute should be changed.

I do not, however, regard the provisions of the pertinent sections heretofore quoted as mandatory upon the municipality. Section 4605 of the Code is clearly permissive in character. It states that the council may, up to a certain limit, levy a tax for the maintenance of the firemen's pension fund. It is, of course, true that the succeeding section is mandatory in its language and requires the transfer of certain portions of the annual tax upon the business of trafficking in intoxicating liquors to the firemen's pension fund in the event of the failure of council to make the maximum levy provided in Section 4605. If, however, by reason of changed circumstances, the revenue derived from this annual tax is negligible, so there is nothing available to augment the levy authorized by Section 4605, the character of council's action in making the levy is not changed. That is to say, it still remains permissive only and there is no obligation upon the municipality to make appropriations sufficient to maintain the fund.

A consideration of your question has necessarily included a discussion of your third and fourth questions, which are as follows:

"3. Section 4605, G. C.: Is this section obligatory or volitional?"

4. Section 4606, G. C., Dow Tax: The revenue derived from this source is practically depleted due to prohibition laws, the council being unable to use the proceeds to any advantage refuse to comply with Section 4605, G. C. Could the legislative intent be so construed as to compel council to comply with General Code, Section 4605?"

Answering these three questions together, therefore, I am of the opinion that there is no obligation upon the council of a municipality, which has established a firemen's pension fund, to continue to make appropriations therefor, since the provisions of Section 4605 of the General Code merely grant the authority to make a levy for such purpose and do not impose any obligation in connection therewith.

Your fifth inquiry is as follows:

"Section 4609, G. C.: Could a member of the fire department ignore the provisions of this section by refusing to contribute a uniform amount established by the rules and regulations of the trustees of the pension board and not forfeit his pension rights?"

A careful reading of the language of the section mentioned will, I believe, answer the question propounded. As I have before stated, the contributions made under authority of this section are to be kept separate from the moneys derived from taxation and other sources. They are to be used solely to increase the pension to be granted to the person making the contribution or his beneficiary. There is a close analogy between the provisions relative to the firemen's pension fund and those sections of the Code relative to the police relief fund and the discussion with relation to the latter, found in Opinions of the Attorney General for 1915, Volume 3, page 2289, is pertinent. I shall not quote therefrom, since it is sufficient to state that the existence of two separate funds is clearly recognized and, this being so, I feel that the failure of a member of the fire department to make voluntary contributions in accordance with the rules and regulations of the trustees will not in any way affect

his right to participate in the firemen's pension fund, in so far as that fund is derived from sources other than voluntary contributions.

Your sixth question is as follows:

"Can another than the board of trustees of a firemen's pension fund and police relief fund prepare rules or revise same governing pension funds and their application?"

The section of the Code providing for rules and regulations is Section 4612, which is as follows:

"Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by the director of public safety or the fire chief of the municipality, as the case may be."

Aside from the consideration of the home rule provisions of the Constitution, I feel that this section provides the exclusive authority for the making of rules and regulations and vests this authority in the trustees. By the terms of Section 4628 of the Code the same right to make rules and regulations is vested in the trustees of the police relief fund. I am accordingly of the opinion that, where no charter provision or contrary ordinance exists, the sole authority to make rules and regulations governing the firemen's pension fund and the police relief fund is vested in the respective boards of trustees, subject to the approval of such rules and regulations by the director of public safety or fire chief or marshal, as the case may be.

If, however, your question is directed to the applicability of these sections in the specific instance of the city of Cleveland, perhaps a different conclusion would be reached. The rules and regulations under which this fund is administered is a matter of local self-government and I believe it would therefore be competent for the council of the city of Cleveland to provide for the vesting of the authority to make rules and regulations elsewhere than in the boards of trustees, as provided by general law. This authority might also be conferred by charter provision, and in that event it would, of course, preclude action on the part of council.

Your last inquiry is as follows:

"Has the director of public safety veto power over the action of the boards of trustees?"

What I have said in answer to the preceding inquiry is pertinent to this question. Undoubtedly the veto power exists in the Director of Public Safety by statute, but it would be competent, under the home rule powers of municipalities, that the method by which rules and regulations governing the pension funds should be adopted either by ordinance of council or charter provision.

In this discussion no mention has been made of the provisions of law relative to the establishment of the firemen's indemnity fund. In view of the fact that your second inquiry suggests the possible abandonment of the firemen's pension fund, it may be well to refer briefly to the statutes governing the creation and maintenance of a firemen's indemnity fund. Section 4647-1, General Code, provides as follows:

"That in all municipalities having no firemen's pension fund created under the provisions of chapter I, title 12, division 6 of the General Code of Ohio, and having and maintaining therein a fire department supported in whole or in part at public expense, a firemen's indemnity fund shall be created and disbursed as herein provided."

From this language it is obvious that the abandonment of the firemen's pension fund would make the establishment of a firemen's indemnity fund mandatory.

The succeeding sections make provision for the appointment of a board of trustees, the levy of a tax, the investment and disbursement of funds and other provisions similar to those found in the statutes governing the establishment and maintenance of a firemen's pension fund. Section 4647-8 of the Code is as follows:

"The beneficiaries of any such firemen's indemnity fund shall be members of the fire department or their dependents who shall be entitled to be paid the amounts following:

For the total disability of a fireman, sustained while in the discharge of his duties as fireman, the sum of two-thirds of his salary or average earnings, which shall in no case exceed eighteen (\$18.00) per week, and which shall be fixed and determined by the said board of firemen's indemnity fund. For partial disability such an amount per week as shall be fixed by the board of firemen's indemnity fund which in no case shall exceed ten (\$10.00) dollars per week. Provided, however, that no such pension shall be paid to a fireman under full salary during the time of any such disability.

To the widow of any fireman killed while in the discharge of his duties as fireman, or who dies from exposure or injury received while in the discharge of such duty, a sum not to exceed twenty-five (\$25.00) dollars per month, so long as she remains his widow, and the further sum of not to exceed ten (\$10.00) dollars per month for each dependent child under sixteen years of age.

Nothing in this act contained shall be deemed to preclude or limit any municipality from availing itself of the provisions of chapter I, title 12, division 6 of the General Code of Ohio, and a municipality having a firemen's indemnity fund created and maintained under the provisions of this act may at any time avail itself of the said provisions of the General Code and thereupon the provisions of this act shall not apply to such municipalities."

You will observe that this section indicates that the fund is, primarily at least, for the purpose of providing compensation where a fireman is injured or killed in line of duty. It is further to be noted that the last portion of the section again emphasizes that the provisions with respect to a firemen's indemnity fund are an alternative which must be adopted in the event that a firemen's pension fund is not maintained.

It is difficult to perceive just why the Legislature has provided that one of these funds should be the alternative for the other. In my opinion, there is a considerable distinction between a pension fund and an indemnity fund, especially in view of the provisions of Section 4647-8, supra. In the ordinary acceptance of the word "pension," it denotes a payment made to employes who have retired from their employment and ordinarily continues during life. The retirement may not have been due to any injury in the course of employment but may be the result of illness, old age or merely by season of services for a stipulated number of years. On the other hand, Section

4647-8 clearly discloses that the fund in this instance is to provide compensation during enforced absence, either permanent or temporary, due to disability incurred in line of duty. Provision is also made for compensation to widows of those employes killed in line of duty. It is, of course, possible that the trustees of a pension fund might make provision in the rules and regulations which would comprehend expenditures serving the same purpose as those required in the case of the indemnity fund, but this is an entirely optional matter within the discretion of the board. It can readily be seen that, in a particular case, the one fund would not in any respect be a substitute for the other.

I am not unmindful of an expression found in Opinions of the Attorney General for 1922, page 200, to the effect that these funds are identical. The statement is as follows:

"The indemnity fund and the pension fund were both for the protection of firemen and are considered to be the same. Courts have held that there is no magic in a word. Here the purpose of the fund is identical. Based on the above observations, it is believed that the effect of Senate Bill 86 was to make mandatory a law which before was permissive and that therefore the fund provided by Senate Bill 86 was authorized by General Code, Sections 4600, et seq. at the time of the passing by the General Assembly of General Code, Section 1465-61."

While the conclusion of my predecessor in that opinion was correct on the question before him, I feel that the expression just quoted is too broad and that the funds are identical only with respect to the question then under consideration.

Since the establishment of a firemen's indemnity fund is only mandatory where no pension fund exists, and the two funds are not, as I have pointed out, identical, it may be questioned whether the provisions of law with respect to the firemen's indemnity fund are of uniform operation, but this question is not before me and I express no opinion thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.